The Ongoing "Turf War" for Louisiana Tort Law: Interpreting Immunity and the Solidarity Skirmish

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To reach the Bosporus, Jason and the Argonauts had to sail between the Symplegades, two large rock faces which crashed together at regular intervals. The obvious problem for Jason and other travelers was that when the two rock faces crashed, anything caught in the middle was pulverized.\(^1\) Symbolically, the rock faces represent the opposites that people face in the "real" world: good/evil, day/night, man/woman—and in the legal world—plaintiff/defendant.\(^2\) The key for Jason and other travelers was to get beyond this pair of earthly opposites—and reach the land of adventure or land of the gods beyond.

Today, Louisiana's tort lawyer may feel like Jason must have felt looking out from the bow of the Argo, seeing those gargantuan rocks crash together. Louisiana tort law's Symplegades, however, have other names: the Louisiana Legislature and the Louisiana Supreme Court. Like the mythical rocks, the legislature and the court may be seen as opposing forces, at least to tort lawyers. Those two lawgivers have collided on so many tort issues that it frequently is difficult to determine what the law is and how long it will stay that way. That state of affairs is as perilous to the lawyer as the Symplegades were to the ancient mariner.

The Louisiana tort lawyer and his client reasonably may conclude that over the past quarter century or so the legislature and the court have so frequently taken opposite positions on tort issues that they are in a "turf" war for control of Louisiana tort law. Skirmishes between the legislative and judicial branches are inevitable in a system of government which demands judicial interpretation of legislative action. In Louisiana, however, an objective observer might conclude that the battle is "pitched." Thus, the Louisiana tort lawyer's major task is to find for his client some way through Louisiana's modern day legal Symplegades. It is not our mission in this essay to provide a foolproof map through the rocks. Rather, we discuss some examples or "sites" of the "turf" battle between the legislature and the court. Most notably, we analyze the recent "solidarity skirmish" between the two. We also venture some thoughts about the
battle and its causes and whether either side should bear any blame for the hostilities.

At first, one may wonder if the fight for control of Louisiana tort law is a fair one, because in the “pecking order” of laws, the statutory always prevails over the jurisprudential. However, each of the combatants has what it may view as the ultimate weapon—the last word. The legislature can “trump” the court by passing a statute in response to a rule of law fashioned by the court. However, the court, in turn, also has the last word because it ultimately interprets all legislation, even the “trumping” legislation. Thus, both the legislature and the court have the last word, meaning that there is really no last word at all, but rather an endless dialogue (or duel) between the lawgivers. The problem is that the attorney and his client must, in ordering their affairs, predict which branch will be saying what and when. Understandably, those whose fortunes depend upon the law may feel caught in the middle.

How did we come to such a state? Obviously, courts have always interpreted legislation and some conflict is indigenous to our system of government. But has the battle worsened? Is it out of control? If so, which side should “back off”?

In the beginning, there was no real fight. The Louisiana Civil Code originally contained only about 10 articles governing all of tort law. Those articles were general pronouncements of legislative or social policy—empty vessels into which the court could pour whatever it pleased. The most important of these articles were Article 2315, providing generally that anyone who causes damage by his “fault” must make amends therefor, and Article 2316, providing more specifically for liability for some types of negligence. The court has referred to Articles 2315 and 2316 as the “fountainheads” of tort liability in Louisiana. However, they are fountainheads out of which the court decides what water pours. In the nineteenth century and early twentieth century, the Louisiana Supreme Court exercised its power to decide what constituted fault

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3. Of course, the legislature cannot “trump” the court if the court decides that a statute the legislature has passed is unconstitutional. However, the legislature can either enact a new statute on the same subject which passes constitutional muster or turn directly to the people by proposing a constitutional amendment which overrules the court’s earlier decision.

4. The lawyer or judge may at least take some solace here that we have switched metaphors and that he or she is not being crushed between rocks.

5. One might reasonably conclude that Article 2315 itself is sufficient to encompass negligence.

6. Langlois v. Allied Chem. Corp., 249 So. 2d 133 (La. 1971). There, Justice Barham wrote that the Civil Code articles governing tort liability give the courts:
   [A] broad, general principle of legislative will under which we are required to determine when the interest of society is best served by allowing the act of man which causes harm to be accepted as a proper standard of conduct or when society is best served by requiring one who harms another to respond in damages for the injury caused.

   *Id.* at 137.

7. Although the Civil Code provides a definition of three levels of “fault,” those definitions are rarely cited and never meaningfully relied upon in modern tort law. *See* La. Civ. Code art. 3506(13).
somewhat sparingly, generally following the American common law approach to tort liability. Interestingly, the court on occasion followed the common law although doing so required it to ignore express codal language which strongly suggested a different result. For example, Article 2320 provides that a master's liability for the torts of its servant only attaches "when the masters . . . might have prevented the act which caused the damage." Read literally, that language requires some actual, personal fault on the master's part, i.e., the failure to prevent the damage. However, the court ignored the quoted language, instead adopting the common law's doctrine of respondeat superior which imposes liability upon the master if the employee commits a tort in the course and scope of his employment. Another notable example was the court's adoption of the common law rule that the plaintiff's contributory negligence barred recovery in a negligence action, even though the language of former Article 2323 suggested, if not compelled, that comparative fault should apply. Those early judicial interpretations of the Civil Code which deviated from the precise language of the Civil Code produced little furor. The decisions, while arguably inconsistent with the letter of the Civil Code, nevertheless were consistent with the mainstream of American jurisprudence. Then, as now, it was important that Louisiana law be consistent with that of its sibling states.

Then, about a quarter of a century ago, the climate changed. To some, the court began an unreasonable expansion of the scope of tort liability, and that expansion brought criticism. Undoubtedly, the court expanded tort liability, but one can argue persuasively that the court was merely doing what it had done all along—interpret Louisiana tort legislation in the light of the common law. As the Louisiana Supreme Court was expanding tort liability, American tort law in general was undergoing a veritable liability explosion. In fact, in some areas the court did not keep pace with the common law's expansion. One example was the Louisiana Supreme Court's initial tentative adoption of strict product liability in tort. However, in some areas the court went further than the common law. The most notable example was when the court, following the French interpretations of the analogous articles in the Civil Code, applied the

10. The Codal language is not "course and scope of employment," but rather the "exercise of the functions in which they are employed." La. Civ. Code art. 2320.
doctrine of strict liability to owners and guardians of buildings and things.\(^\text{15}\) This expansion was accomplished by applying the common law's notions of enterprise liability, risk spreading, and unreasonably dangerous products to our unique Civil Code articles.\(^\text{16}\)

As liability expanded, those who lost tort battles in the courts remembered the "pecking order" of laws and turned to the legislature. Within a short time, legislation governing tort liability swelled. Several Civil Code articles were added,\(^\text{17}\) and several others were amended,\(^\text{18}\) but by far the greatest effect of tort reform was felt in the Civil Code "ancillaries" and elsewhere. That portion of Title 9 of the Revised Statutes dealing with tort law now fills the better part of a volume, and medical malpractice legislation occupies a substantial portion of another volume.\(^\text{19}\) This legislative proliferation of tort regulation, however, did not "daunt" the court. It continued to interpret the relevant statutes in ways which produced, in the court's view, the proper balance of societal policies and just results. In turn, the legislature sometimes reacted by amending the relevant statute in an attempt to reverse the court's interpretation.\(^\text{20}\) In one noteworthy incident, the legislature was in session when the court interpreted a statute in a manner with which the legislature apparently did not agree. The legislature responded by passing another statute which overruled the court's result and took effect even before the court's decision which prompted it became final.\(^\text{21}\)

Despite some popular misconceptions, it is not always the defendant who loses in the courts and turns to the legislature. For example, the Louisiana Supreme Court has refused to follow its sibling courts and allow general recovery for negligent or intentional interference with contract. A more recent


\(^\text{17}\) La. Civ. Code arts. 2315.1, 2315.2, 2315.3, 2315.4, 2315.5, 2315.6, 2315.7, 2322.1, 2324.1 and 2324.2.


\(^\text{20}\) See, e.g., Bunge Corp. v. GATX Corp., 557 So. 2d 1376 (La. 1990). In Bunge Corp., the Court held that La. R.S. 9:2772 (1990), the ten year peremptive period applicable to actions against building professionals, did not apply to the particular failure to warn/duty to disclose claim before the court because the failure to warn fell within the "fraud" exception to the statute. The legislature acted quickly to overrule Bunge Corp. by amending La. R.S. 9:2772 (1991) to provide that "fraud," as the term was used in that statute, has the same meaning as in La. Civ. Code art. 1953. 1990 La. Acts No. 712, § 1.

\(^\text{21}\) See, e.g., DeBattista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26 (La. 1981) (providing a strict product liability action against a health care provider who provided infected blood to a patient); 1981 La. Acts No. 611, § 1 (codified at La. Civ. Code art. 2322.1); 1981 La. Acts No. 331, § 1 (codified at La. R.S. 9:2797 (1991)). Now, both the Civil Code article and the statute not only prescribe strict liability actions against the applicable provider of blood, organs or tissue, but apparently also prescribe a claim in redhibition.
example is the court’s interpretation of a legislative act governing forfeiture of workers’ compensation benefits for false statements made for the purpose of obtaining such benefits. The court concluded that the better societal policy was to require forfeiture even though the worker was not put on notice of the consequences of making the false statement and the employer was not prejudiced by the false statement.

As the battle between the court and the legislature has intensified and the strategies have been refined, the legislature’s most apparent strategy, consciously adopted or not, has been to “micromanage” tort law. The legislature has passed a score of statutes dealing with the liability of particular classes of people for particular types of misconduct. Nowhere is this trend clearer than in the spate of “limited immunity” statutes adopted in recent years. For instance, if a parade attendee is hit by an object thrown from a float (like a coconut or a head of cabbage, depending on the time of year and the type of parade), the parade organizer probably is immune from tort liability. A similar statute provides immunity, except for “a deliberate and wanton act or gross negligence,” to organizations sponsoring Mardi Gras parades or other parades “connected with pre-Lenten festivities or the Holiday in Dixie Parade.” Another statute immunizes the organizers of St. Patrick’s Day and other ethnic parades. Additionally, a director of a non-profit organization may be covered by at least three separate immunity statutes for the same act or conduct. The owner of non-profit recreational land opened to the public, but not necessarily to all of the public, is covered by two immunity statutes which limit liability for acts less blameworthy than willful or malicious misconduct. Owners of recreational lands in Louisiana will be pleased to learn that they are immunized if they open their land up for snow mobiling or snow skiing. The last legislative session may have produced the ultimate in micromanagement. If you are assisting the council on aging, you are personally immune unless your conduct is intentional or willful, but your auto liability insurer is liable, for your negligence or strict liability. Also, if you are providing health care at a designated Lafayette Parish health clinic, but not any other, you enjoy a special immunity.

24. La. R.S. 9:2796.1 (Supp. 1995). See also Trondsen v. Irish-Italian Parade Comm., 656 So. 2d 694 (La. App. 5th Cir. 1995). One may sense the irony in that participants in a parade honoring the discoverer of America must claim it is an “ethnic” parade to enjoy immunity, while participants in a parade honoring the man who drove the snakes out of Ireland are expressly provided with immunity.
Several years ago, the legislature created what might be called an "anticipatory" immunity. The legislature immunized certified poison control centers from tort liability absent gross negligence, bad faith, or other willful or wanton misconduct. However, as the legislature expressly recognized in the statute, there was at the time no certified poison control center in Louisiana. The immunity was created because insurance was unavailable for such an operation, and it was hoped that a particularized, context-specific statute dealing with tort liability would induce someone to open a poison control center. Thus, in a way the immunity statute was enacted not in response to a decision by the court, but in anticipation of one. In battle parlance, the statute was a preemptive strike. In another notable example, after the court provided a detailed answer to a certified question on Louisiana product liability law, the legislature responded by codifying the law but specifically overruling the crux of the court's decision.

The turf war has become so intense that both combatants have sought alliances with the only other important player in the mix—the people. The supreme court has found constitutional roots in some of the tort liability it has established and in some of its interpretations of tort legislation. This means, of course, that because the court's decision has a constitutional base, the legislature cannot simply "trump" the court by passing a statute, but must obtain passage of a constitutional amendment. But two can play that game. After the Louisiana Supreme Court invalidated legislation limiting general damages available from the state and limiting the amount of prejudgment interest recoverable from the state as impermissible resurrections of sovereign immunity, the legislature turned to the people to reestablish sovereign immunity through a Constitutional amendment. The amendment passed, but now the court gets to interpret it.

The battling between the court and legislature can get inane at times, as demonstrated by a 1995 act. The legislature long ago chose to immunize the
employer from the employee's work-related tort claim unless the employer's injuring conduct is intentional. The battles over what is and what is not an intentional tort for the purposes of employer immunity are so numerous and sometimes so conflicting that further comment here would not be productive. However, a recent "employer immunity" battle indicates the Legislature's apparent frustration with the court's "interpretations" of legislation. In the celebrated case of Billiot v. B. P. Oil Co., the Louisiana Supreme Court further eroded the employer's immunity by holding that it did not apply to punitive damage claims arising out of willful and wanton handling of toxic materials. The legislature quickly responded to overrule the holding of Billiot, but it also attempted to send a message to the court. Hence the language of Act 432 of 1995: the employer's immunity is "exclusive of all other rights... including... punitive or exemplary damages, unless such rights... are created by a statute, whether now existing or created in the future, expressly establishing same as available." What if the

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42. 1914 La. Acts No. 20.
45. One should note that sometimes the court has interpreted a statute so as to "rescue" the legislative will from inartful statutory drafting. For example, when the legislature amended the workers' compensation statutes in 1976 to provide executive officers with immunity, it created the intentional misconduct exclusion. However, rather than using the words "intentional tort," which had a commonly accepted meaning in the legal community, the legislature provided that the workers' compensation immunity did not extend to an "intentional act." See La. R.S. 23:1032A (1989). The problem is that many "acts" are intended, but the consequences are not. Intent, in the tort arena, refers to the consequences of the act, i.e., harmful and offensive contact for a battery, placing one in apprehension of a harmful or offensive contact for an assault, etc. A resourceful plaintiff's lawyer seized upon the "intentional act" language and argued that it meant "voluntary act." If the court had accepted that reading of the key language, it would have exposed employers to potential tort liability for negligence in many cases because negligence often arises out of a voluntary act. Wisely, the court, in an opinion by Justice Dennis, refused to so read the critical language, noting that one of the purposes of the 1975 legislation was to broaden the immunity and that reading intentional act to mean voluntary act would in effect vastly expand the employer's tort liability and narrow his immunity. Bazely v. Tortorich, 397 So. 2d 475 (La. 1981).
46. 645 So. 2d 604 (La. 1994).
47. La. Civ. Code art. 2315.3 provides for the recovery of exemplary damages, in addition to general and special damages, where the defendant has wantonly and recklessly disregarded the public safety in the handling, storage or transportation of hazardous or toxic substances.
48. 1995 La. Acts No. 432 (amending La. R.S. 23:1032 (1989)). Because of its choice of language, the legislature was not crystal clear in its attempt to overrule Billiot. This is because the amended statute preserves "now existing" punitive damages claims "expressly" provided for by statute. No existing statute expressly grants an employee the right to recover punitive damages from his employer, unless one considers the penalty provisions of the compensation statute as doing so. However, the compensation statute already excludes any penalty from its exclusivity provision. La. R.S. 23:1032(A)(1)(a) (Supp. 1995). If the "now existing" language refers to the penalty provisions of the compensation statute itself, it is mere surplusage. Thus, it arguably refers to something else, but the only other statute which had been interpreted to provide an employee with a right to recover
1997 legislature establishes another "right" to recover punitive damages and does not expressly provide whether that right is within the employer's immunity? Reading Act 432, one would conclude that the 1995 legislature intended that the employer's immunity extend to such a newly created right. However, it would be the intent of the 1997 legislature, and not that of the 1995 legislature, that would control. And who will decide what the 1997 legislature intended?49

Another major skirmish in this torts "turf" battle is occurring in the "solidarity zone."50 The general question is age-old and perplexing: as between the tort victim and the tortfeasor, who should bear the risk that a third person whose conduct contributed to the harm is immune, insolvent, or unknown? A little history helps understand where Louisiana is today and how it got there.

The first "joint" tortfeasors were intentional tortfeasors, usually acting in concert to cause the victim's harm.51 If one of the intentional tortfeasors was insolvent, the other tortfeasor was liable for all of the damages. Usually the harm was indivisible, such as a broken leg, but even if it was divisible, the actors' conduct was so egregious that it seemed imminently fair to make each "tortfeasor" liable, i.e., the plaintiff could make either or any of them pay all of the plaintiff's damages. It was the plaintiff's ability to make any of the tortfeasors pay for the damages that led the civil law to say the tortfeasors were solidarily liable.52 The common law reached the same result with a different legal label: the tortfeasors were jointly and severally liable.53

Then along came negligence and a more challenging scenario: two negligent actors whose conduct coalesced to cause indivisible harm. Here the law took a strange turn. If the negligence of the two actors impacted upon the body of the

punitive damages from the employer was La. Civ. Code art. 2315.3. However, that article does not expressly provide the right. Consequently, something in the critical language of Act 432 is meaningless. Either the "now existing" language means nothing and Billiot is overruled, the probable result, or the "expressly" provided language means nothing and Billiot is not overruled. In any event, Act 432 applies prospectively only. Thus, Billiot claims arising before the passage of the act should continue on their course through the litigation process.

49. Interestingly, the recent history of employer/employee tort relations can be viewed through the lens of the turf battle between the legislature and the court. After the legislature, arguably in response to a series of court opinions, extensively amended the workers' compensation statutes in 1989 to make compensation more difficult to recover, see 1989 La. Acts No. 454, the court has responded by permitting employees to recover in tort for their employer's negligence. See, e.g., Cox v. Glazer Steel Corp., 606 So. 2d 518 (La. 1992); Weber v. State, 635 So. 2d 188 (La. 1994); Stelly v. Overhead Door Co., 646 So. 2d 905 (La. 1994). See also Hunt v. Milton J. Womack, Inc., 616 So. 2d 739 (La. App. 1st Cir. 1993).

50. The reader should not confuse the "solidarity zone" with the famous "Twilight Zone" of both television and maritime fame. The reader who lived through the Vietnam war may confuse the "solidarity zone" with the "demilitarized zone"—both have proved far from peaceful.


victim at different times, such as automobile accidents months apart, the courts "divided" the indivisible, thus making each of these "successive" tortfeasors pay only a part of the damages. The jurisprudence accomplished this by saying that the damages were, in fact, divisible, even though that result defied medical science. Thus, the risk that the other tortfeasor was insolvent or otherwise unable to respond in judgment was borne by the victim. However, there was one major "exception": if the second tortfeasor's wrong was within the scope of the risks of the first tortfeasor's duty, the first tortfeasor owed all of the damages. For instance, if Planiol negligently injured Livingston's back and then Dr. Tullier committed malpractice upon Livingston during his treatment of the injured back, Planiol was liable for all of Livingston's injuries, including those caused by Tullier's malpractice. Planiol was liable for all the damages, even where they were otherwise divisible. This exception was merely a straightforward application of general tort principles regarding duty and legal cause, or in Louisiana, duty/risk.

Finally, there is the scenario in which the two negligent acts impact upon the body of the victim at the same time, or at almost the same time, and produce an indivisible injury, which is almost always the case. The courts, following the intentional tortfeasor jurisprudence, ruled that those negligent parties, concurrent tortfeasors, were liable for the full amount, i.e., they were solidarily (jointly and severally) liable. This arguably was a fair result. One could not divide the damages and before comparative negligence, one could not divide, or "quantify," the fault of the tortfeasors to permit each to pay only the damages attributable to his percentage of fault. Thus, under the then-existing state of the law, the risk of the insolvent, immune, or unknown tortfeasor had to be borne by either the victim or the solvent tortfeasor, and the choice of the latter was consistent with many of the objectives of tort law.

But then came comparative negligence and with it the concept that fault could be quantified. This development, coupled with the phenomena of tort

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55. In some cases in which the plaintiff could not prove who caused what damage, the plaintiff took nothing. See Deutsch v. Connecticut Co., 119 A. 891 (Conn. 1923); Maas v. Perkins, 253 P.2d 427 (Wash. 1953). However, the clear trend in Louisiana in such cases is to divide the indivisible and allow the factfinder to make any arguably acceptable appropriation of damages between the two accidents. For a recent example, see Buccola v. Marchese, 599 So. 2d 892 (La. App. 4th Cir. 1992) (damages from two accidents occurring several months apart and involving two separate drivers must be apportioned, though the apportionment is somewhat arbitrary).


57. Here, for simplicity’s sake, we assume that the duty of one tortfeasor does not include the risk of the other tortfeasor’s wrong. Where it does, a straightforward duty/risk application would make the tortfeasor whose duty included the risk of the other tortfeasor’s misconduct liable for 100% of the damages.
reform and its liability limiting rules, has caused most jurisdictions to re-evaluate solidary (joint and several) liability between negligent joint tortfeasors. Some jurisdictions have repudiated solidarity, some have maintained it, and others have modified it. The Louisiana Legislature chose the third approach in 1987 when it amended Article 2324 to provide, in relevant part, that:

B. If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages; however, when the amount of recovery has been reduced in accordance with the preceding Article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of fault has been attributed. Under the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution. Except as described in Paragraph A of this Article, or as otherwise provided by law, and hereinabove, the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.

While the amendment is by no means a model of clarity, one thing is obvious: the legislature did not intend that a person whose negligence coalesced with that of an immune, insolvent, or unknown person to cause indivisible damage would be liable for all of those damages. Obviously, one might conclude that it is unfair to impose upon the victim, particularly the innocent, i.e., non-negligent one, some or all of the risk of the immune, insolvent, or unknown joint tortfeasor. Indeed, some jurisdictions which have adopted comparative fault still impose all of that risk upon the solvent tortfeasor. However, that arguably was not what the Louisiana Legislature chose. It amended Article 2324 to provide for a modified or truncated form of solidarity. But until the court spoke,

58. For an exhaustive review of the differing approaches to allocation of the insolvent tortfeasor's share after the advent of comparative negligence, see Coats v. Penrod Drilling Corp., 61 F.3d 1113 (5th Cir. 1995). See also 2 Comparative Negligence § 13.30 (1988).
59. Id.
one would not know precisely what the legislature created. And speak the court has, much to the chagrin of joint tortfeasors.

First, in the celebrated case of Touchard v. Williams, the Court ruled that 2324(B) did not limit solidarity to the plaintiff’s recovery of 50% of his damages. Relying upon the phrase “to the extent necessary,” the defendants argued that after the plaintiff recovered 50% of her total damages, no one is solidarily liable for the remainder because solidarity is not necessary for the plaintiff to recover 50%. The court rejected this reading, concluding instead that the article merely imposed a 50% “cap” on the solidarity of a negligent defendant whose percentage of the fault was less than 50%. Thus, although the article did not apply to a tortfeasor whose fault was greater than 50%, a tortfeasor whose fault was less than 50% was potentially liable for up to 50% of the damages. But did this 50% “cap” apply to each defendant, or was it a per case, or per obligation, “cap”? A footnote in Touchard indicated that only one of the tortfeasors whose fault was less than 50% could be “bumped up” to 50%.

What about the immune tortfeasor? He could not be cast in judgment, but who would absorb the economic cost of his contribution to the accident? Plaintiff? The solvent, non-immune defendant? Both? Or whomever the factfinder chose? In Gauthier v. O’Brien, the Louisiana Supreme Court held that the immune employer’s fault should be quantified but then should be reallocated to the other at-fault parties, including plaintiff, in proportion to their allocated portions of fault. Under that reallocation “formula,” the victim/employee and the non-immune tortfeasor(s) would bear the “fault” of the immune employer in relation to their relative percentages of fault. But did the Touchard 50% “cap” apply in an employer fault case? The court indicated in a footnote in Gauthier that it did not.

Before returning to the Gauthier issues, the court provided some interesting harbingers that the 50% limit on a joint tortfeasor’s liability provided in Article 2324(B) could be avoided by application of the scope of the risk analysis. In

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62. 617 So. 2d 885 (La. 1993).
63. See Galligan, supra note 60, at 562-67.
64. Touchard, 617 So. 2d at 887 n.3. See generally Galligan, supra note 60, at 567-71.
65. 618 So. 2d 825 (La. 1993). Prior to Gauthier, the court had held that under the original version of La. Civ. Code art. 2324, an employer’s fault should not be quantified by the factfinder. See, e.g., Guidry v. Frank Guidry Oil Co., 579 So. 2d 947 (La. 1991); Melton v. General Elec. Co., 579 So. 2d 448 (La. 1991).
66. Somewhat illogically, but consistently with prior jurisprudence, the employer would be entitled to recover through subrogation any compensation payments he had made to the employee, reduced by the employee’s fault. See supra note 65; La. Civ. Code art. 2323. Thus, the employer’s fault does not directly affect its compensation payments, but would only directly affect its recoupment; if some of the employer’s fault was reallocated to the plaintiff/employee, the employer’s recovery would be reduced by that reallocated portion.
67. Gauthier, 618 So. 2d at 830 n.11; see also Galligan, supra note 60, at 578-84.
Lambert v. United States Fidelity & Guaranty Co., the plaintiff sued the defendant seeking damages for an injury caused by the defendant and aggravated by post-trauma medical treatment of those injuries. Defendant then attempted to allege and prove the fault of the allegedly negligent doctor who provided the post-trauma treatment. In a per curiam opinion, the Louisiana Supreme Court held that the trial court did not err in refusing to allow the defendant to amend his answer to allege the fault of the doctor. The court pointed out that if the defendant was at fault he would be liable for all of the plaintiff’s damages, including those caused by the health care provider, because the defendant would be the “legal cause” of all the damages. Put differently, in duty/risk rubric, the defendant’s duty included the risk of the subsequent medical injury, even if caused by a negligent physician.

Then, in Veazey v. Elmwood Plantation Associates, Ltd., the court was presented with a case in which the fault of an unknown intentional tortfeasor (an unidentified rapist) and a negligent tortfeasor (plaintiff-victim’s lessor, an apartment complex operator) coalesced to cause indivisible harm: the rape of the tenant. If Article 2324 applied literally in this situation, the fault of the concurrent tortfeasors, the rapist and the apartment complex operator, would be compared and the operator would be cast for his percentage of fault or 50%, whichever was greater. However, using a scope of the risk analysis, the court reached a different conclusion. A divided court held that because the “specific” risk which made the complex operator’s conduct negligent was the criminal attack by the rapist, the complex operator was liable for the full amount. Thus, the trial court had not erred in refusing to ask the jury, which had decided the case, to allocate fault to the phantom rapist. The decision meant that functionally the apartment complex operator in Veazey occupied the same legal position as the initial tortfeasor in Lambert.

Identifying the “specific” risk within the defendant’s duty may be a rather nebulous quest without a clear answer. As both Lambert and Veazey illustrate, “scope of the risk” can be a “slippery slope” to responsibility, i.e., liability, for the unforeseeable and to what some might deem the unreasonable. However, Lambert relied upon commonly accepted duty/risk principles applied in successive tortfeasor cases. Most jurisdictions hold subsequent malpractice is, as a rule, deemed “foreseeable” to the initial tortfeasor. While Veazey is not such a case, it is unusual in that the risk that occurred was the exact risk that made the negligent tortfeasor negligent. If one asks the question “is it unreasonably risky to fail to provide adequate security at an apartment complex

68. 629 So. 2d 328 (La. 1993).
69. The court cited Weber v. Charity Hosp., 475 So. 2d 1047 (La. 1985), for this proposition. While Weber does stand for the rule of law relied upon by the Court, Weber was decided under the old version of Article 2324.
70. 650 So. 2d 712 (La. 1994).
which houses women," one of the first thoughts that comes to mind is "yes, because one of the tenants may be subjected to rape by an intruder."

But, what if you apply the Veazey/Lambert approach to two negligent tortfeasors whose conduct impacts upon the victim at the same time, and the risk that occurs is not that exact? That situation was not long in presenting itself to the court. In Turner v. Massiah,71 two doctors, acting independently, malpracticed upon a victim, causing loss of a chance of survival. What result? Comparative fault with 50% solidarity? Not so, said the supreme court. Because the negligence of each was within the scope of the risks of the other, each was liable for the full amount. Thus, the court made a potential "end run" around the 50% cap of Article 2324(B), using "scope of the risks" as its blocker. But, unlike the traditional end run, which is contained by the football field's sidelines, this end run can be extended as far as a court will allow "proximate cause," "legal cause," or "duty/risk" to stretch. One can logically extend Turner to hold that the duty of a driver to his passenger includes the risk of collision with another faulty driver, thereby exposing driver one, and maybe driver two, to 100% liability to driver one's passenger.

More recently, the court has revisited the Gauthier employer fault issue and its reasoning has ramifications as far-reaching as any of its prior decisions on solidary liability. In Cavalier v. Cain's Hydrostatic Testing, Inc.,72 the court unanimously concluded that its Gauthier decision on allocation of employer fault was wrong. The new rule: where there is a workplace victim, a single tortfeasor and the victim's immune employer, the employer's "fault" should not be quantified. Thus, if the victim is not contributorily negligent, the third party tortfeasor will owe 100% of the damages. However, Cavalier went even further. The court opined that under Louisiana Code of Civil Procedure article 1812(C), non-party fault should not generally be quantified "unless there is a compelling reason, such as in the case of a settling tortfeasor."73 Thus, the defendant cannot point to the empty chair and place a portion of the blame on someone not before the court other than one who has settled with the plaintiff. The decision in Cavalier may force defendants to name as third-party defendants all possible tortfeasors as parties. But is there a way to make a "phantom" a party to a lawsuit? If not, then after Cavalier a negligent tortfeasor is liable for the full amount of the damages, if his "joint tortfeasor" is immune or unknown, and the plaintiff is blameless. Of course, if the defendant brings in a third-party defendant and proves that party's fault, the 50% limit of Article 2324(B) should apply. Obviously, after the defendant names a third-party defendant, the plaintiff has an incentive to amend his petition to state a claim directly against the third-party defendant. Thus, Cavalier will lead to litigation among actual, involved

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71. 656 So. 2d 636 (La. 1995).
72. 657 So. 2d 975 (La. 1995).
73. Id. at 982. After Cavalier a defendant can argue that it should be exonerated because a non-party was a superseding cause or a "sole proximate" cause of the plaintiff's injuries. Cavalier does not discuss this possibility.
parties and will frustrate efforts to blame those not present. Of course, where a non-party really is unknown, unavailable, or immune, the defendant cannot make him a party and the jury cannot be told to quantify his fault. However, evidence about the "absent" actor's conduct ordinarily will be relevant to the fault of the plaintiff and the defendant(s). The jury that hears that evidence may be inclined to attribute more or less fault to the present defendant or to the plaintiff or may "prorate" between the plaintiff and defendant its perception of the absentee's contribution to the event in suit. One can argue that the problem is best resolved in the give and take of the jury room rather than by legislative fiat or judicial rule cast in stone. Cavalier achieves that result.

After Cavalier, what if there are two or more solvent defendants who are named parties? Put another way, what effect, if any, does Cavalier have on the Touchard footnote which indicated the 50% "cap" was a "per case cap?" In a footnote in Cavalier, the court indicated that "each" solvent available defendant whose fault was less than 50% could be made to pay 50% of the total damages. This later footnote arguably repudiates the earlier Touchard footnote. Thus one can argue, after Cavalier, that a blameless victim who is injured by a solvent tortfeasor and an immune or unknown tortfeasor, or a blameless victim who is injured by two or more solvent tortfeasors, can collect 100% of his damages. In essence, the blameless plaintiff bears none of the risks of the immune, insolvent, or unknown tortfeasor. Arguably, after Cavalier, Article 2324(B) has lessened practical significance, and things should stay that way for a while. Clearly a court which kept Cavalier under advisement for six months, was then unanimous in its decision, and which carefully explained its rationale and the implications of that rationale for other cases, must have intended its decision to be the last word. And probably it will be, until 1997. But one can anticipate that the business interests in the legislature will be seeking a revision of Article 2324 in 1997, a revision that would affect Cavalier.

Stepping back, is there a "villain" in this "turf war"? Not in the traditional sense. Many legislators no doubt believe in good faith that the court has expanded liability too far. And the court no doubt is concerned that broad principle, rather than detailed, specific rules tailored to protect specific interest groups, should guide tort law. When either body believes that the other has gone too far, it can use its power to move the pendulum back to what it perceives to be the "center." One also must remember that each of the combatants may honestly believe that the other is invading its "turf." Traditionally, the legislature made broad pronouncements of how people generally should act. But it is the court system, supervised by the supreme court, which must see that justice is achieved in a particular case in which the actors' fortunes are at

74. Id. at 982 n.6.
75. The 1996 legislature is limited to fiscal matters.
76. Even Article 2324(B), which applies in all nonintentional tort cases, does not apply in non-tort cases. Thus, the truncated solidarity it creates is limited to tort cases.
stake. The line between the two—broad rules and specific justice—is not always clear, and a participant in this “turf war” may unwittingly usurp the other’s function while trying to perform its own.

A traditional argument is that courts are inferior lawgivers because they are limited generally to the facts and issues in the case before them, while the legislature can gather data and formulate comprehensive rules to regulate a particular area of human conduct. However, one must not overlook the fact that legislation often is adopted in a somewhat frenzied and pressurized situation, while the supreme court enjoys the luxury of providing its answer on its own timetable. Sometimes the pressure and frenzy produce legislation which, at best, borders upon the absurd. Consider Act 738 of 1995, providing that a retail dealer of alcoholic beverages who substitutes one brand of beverage for a brand specifically requested by the customer, without the customer’s consent, is subject to suit “for damages which result from the substitution” and attorney fees and costs. It seems clear beyond peradventure that the judicial system should not be burdened with a lawsuit by a bar patron irked because the bartender serves him Rot Gut scotch instead of Johnny Walker. Yet unless the legislature repeals the act, the court ultimately may be required to nullify in some fashion this “absolute liability” for frivolous fault.

Some final points merit attention. Let us turn to what Justice Barham wrote in *Langlois v. Allied Chemical Corporation*:

Under [the tort articles of the Civil Code] the courts of this state have been given a broad, general principle of legislative will under which we are required to determine when the interest of society is best served by allowing the act of man which causes harm to be accepted as a proper standard of conduct or when society is best served by requiring one who harms another to respond in damages for the injury caused. Our common law neighbors are required, conversely, to begin with the jurisprudence arising out of specific circumstances and to draw from this jurisprudence a general principle to govern future determinations. It has been said: “* * * The merit of the civilian general principle lies in the fact that the principle is wider than the cases decided and that hence it has within itself the potentiality of growth.”77

Thus, under that interpretation of the civilian approach to torts, the courts apply and give meaning to the broad principle provided by the Civil Code that everyone should repair damages caused by his fault. That also is the approach to torts adopted by the French courts and legislature. It is a sensible approach if one considers that accidents are not planned.78 Because accidents occur in unusual and sometimes bizarre manners, the best way to govern this area of the

77. 249 So. 2d 133, 137 (La. 1971) (citations omitted).
78. Although for some defendants accidents are planned in the sense that they are statistically likely to occur.
law is through a general standard which allows a society to defer decision on responsibility for an injury until after the event has occurred. The common law generally agrees with this approach.

However, one will note that many of the legal developments we have written about involved detailed legislative efforts to dictate results in specific types of cases. The immunity and solidarity legislation discussed above represent legislative efforts to dictate the result in specific types of cases. In that regard, these acts are inconsistent with what Justice Barham wrote in Langlois. For instance, although Article 2324(B) arguably and literally applies in almost every multi-tortfeasor, non-intentional tort case, the changes it makes in solidarity apply only to tort cases. That is, the 50% cap on solidarity is tort specific; it does not change the underlying principle of solidarity. It just truncates it in tort. The immunity statutes are even more specific. They are special protection for special groups. One searches for their principled base. Moreover, the immunity statutes gnaw at and threaten the very fabric of the Civil Code's tort scheme.

What is the alternative to the turf war? One thought is to limit the effects of the political process on the combatants. Witness the move to make judgeships appointive and to limit the terms of legislators. At best, however, that will only partially solve the problem because the problem is inherent in our form of government. Someone must make the laws and someone must interpret and apply them. It is the nature of a "checks and balances" governmental process that the same body cannot enact and interpret. Given the different views involved, the battle is inevitable. And whether the result achieved is good or bad for society may depend upon "where one's ox is tied."

In closing, let's return to Jason and the Argonauts. The Argonauts found a solution to the Symplegades—sending a dove flying ahead of the Argo. As the dove flew between the rocks to the Bosporous, the Symplegades crashed together, nipped the dove's tail feathers and then opened again, allowing the Argonauts to quickly row through with minimal damage. Thereafter, the rocks were stuck open forever. Thus, mythology offers at least the hope of a solution if not concrete advice as to how to attain it. Modern day Louisiana tort lawyers understandably hope for such a dove to lead them to the land beyond colliding opposite forces.

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79. As Justice Dennis wrote in Entrevia v. Hood, 427 So. 2d 1146 (La. 1983), a broad standard allows the court, after the fact, to consider all the relevant moral, economic, and social factors involved and then in the civilian tradition, decide the case as a legislator, looking at the same facts, might decide. Id. at 1149.

80. Graves, supra note 1, at 200.